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IN THE

Supreme Court of the United States

October Term, 1958.

No. 45

BEACON THEATRES, INC., a corporation,

Petitioner,

vs.

THE HON. HARRY C. WESTOVER, Judge of the United States District Court of the Southern District of California, Central Division, Fox West Coast Theatres Corporation, Pacific Drive-In Theatres, Inc.,

Respondent.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in 252 F. 2d 864.

Jurisdiction.

The order of the Court from which Certiorari was sought was entered on January 7, 1958. [R. 102.] The Order Extending Time to File Petition for Writ of Certiorari was extended to and including April 8, 1958. [R. 126.] The Petition for Writ of Certiorari was filed on April 8, 1958, and was allowed on May 19, 1958. [R. 126]. The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

The Questions Presented.

In anticipation of an imminent suit for damages by petitioner, under the Clayton and Sherman Acts (Title 15 U. S. C., Secs. 1, 2, 15) wherein petitioner as plaintiff would have been entitled to a jury trial as a matter of right, the prospective defendant (Fox West Coast Theatres Corp.) hereinafter referred to as Fox West Coast filed and served a complaint for declaratory judgment. The complaint raised substantial issues common to the impending damage suit by petitioner. Subsequently, in this action, those issued were raised by petitioner in its counterclaim for damages under the antitrust laws, 15 U. S. C., Secs. 1, 2, and 15. The trial court held, over petitioner's objection, that it would try those common issues as a part of respondent's declaratory judgment action, without a jury, before the trial of petitioner's counterclaim, although such prior trial by the court thereby would deprive petitioner of the right to try those substantial issues to the jury.

Upon petition to the Court of Appeals for the Ninth Circuit for a Writ of Mandamus, that court held that a federal court had discretion under Rule 42(b) of the Federal Rules of Civil Procedure to deprive petitioner of its right to trial by jury on those common issues because the complaint for declaratory judgment contained allegations of petitioner's prior threats that it intended to file such a damage suit and allegations of irreparable in-

ury resulting therefrom, thus stating a claim which was equitable" in nature.[1]

The questions presented are the following:

1. May a Court of Appeals hold, under the Seventh Amendment to the Constitution and Rule 57 of the Federal Rules of Civil Procedure, that substantial issues of fact raised in a complaint which prays for a declaratory judgment of nonliability, otherwise triable by a jury, which complaint is filed in anticipation of a suit for damages, triable as of right to a jury, shall be tried to the Court, without a jury, over the objections of the opposite party, because the complaint also alleges threats of that damage suit and irreparable injury resulting therefrom.

2. Where the basic issues in a complaint seeking an injunction against a threatened jury trial for damages are in essence a defense to or a denial of issues in that im-

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[1]To avoid a completely abortive trial before the wrong trier of fact, United States Courts of Appeals, and this Court, have often permitted the use of extraordinary remedies.

Bereslavsky v. Caffey (2d Cir.), 161 F. 2d 499;
Bereslavsky v. Kloeb (6th Cir.), 162 F. 2d 862;
Canister Co. v. Leahy (3d Cir.), 191 F. 2d 255;
United States Alkali Export Assoc. v. United States (1944), 325 U. S. 196, 89 L. Ed. 1554;
Ex parte Simmons (1917), 247 U. S. 231, 62 L. Ed. 1094;
Ex parte Peterson (1920), 53 U. S. 300, 64 L. Ed. 919;
Ex parte Skinner and Eddy Corp. (1923), 265 U. S. 86, 68 L. Ed. 912;
Los Angeles Brush Mfg. Co. v. James, 272 U. S. 701, 71 L. Ed. 481;
Ex parte Williams, 277 U. S. 267, 72 L. Ed. 877;
McCullough v. Cosgrave (1944), 309 U. S. 634, 84 L. Ed. 92;
Norwood v. Kirkpatrick, 349 U. S. 29, 99 L. Ed. 789, 75 S. Ct. 544;
LaBuy v. Howes, 352 U. S. 249, 1 L. Ed. 290.

pending action may a litigant be deprived of a jury trial as to those issues by their prior trial by the Court as a "claim in equity", or is such deprivation of jury trial forbidden by the Seventh Amendment to the Constitution and Rule 38 of the Federal Rules of Civil Procedure.

3. May a Federal Court under the Seventh Amendment to the Constitution, and Rule 38 of the Federal Rules of Civil Procedure, in a civil action involving joined or consolidated so-called "equitable" and so-called "legal" claims, which claims include common substantial questions of fact, deprive either party of a properly-demanded jury trial upon those substantial questions of fact by proceeding to a previous disposition of the claim denominated "equitable", and thus causing those facts to become *res judicata*.

Statutes Involved.

The pertinent statutory provisions are printed in Appendix A, *infra*, page 1.

Statement.

This action was commenced in the United States District Court for the Southern District of California by Fox West Coast Theatres Corporation, a Delaware Corporation.[2]

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[2]The real parties in interest are Fox West Coast Theatres Corp., hereinafter referred to as Fox West Coast, a Delaware corporation, and Pacific Drive-in Theatres, Inc., a California corporation; the respondent Hon. Harry C. Westover is Judge of the United States District Court of the Southern District of California, Central Division, who entered the orders giving rise to this petition.

A. Legal Basis for Federal Jurisdiction Alleged in Complaint.

The complaint entitled "Complaint for Declaratory Re-f" alleged:

(a) That it was brought pursuant to the Federal eclaratory Judgment Act, Title 28, U. S. C. A., Sec-ons 2201 and 2202, for the purpose of having the court eclare the rights and obligations of the parties under e facts alleged in the complaint. [Complaint, R. 11.]

(b) That the matter in controversy arose under Sec-ons 1 and 2 of the Sherman Act, which prohibit re-raints of trade and monopoly, and under the private amage provisions of the Clayton Act which provide or a remedy in damages for private persons injured. 15 U. S. C. A., Secs. 1, 2, 15.) Diversity of citizen-hip and the statutory amount in controversy was also lleged. [Complaint, R. 11.]

B. The Allegations in Support of the Claims for Declaratory Relief.

The complaint alleged:

(a) That Fox West Coast and petitioner are owners f theatres in or near the City of San Bernardino, Cali-ornia; that Fox West Coast had for many years owned nd operated the "California Theatre" in the City of San Bernardino; and that petitioner had recently constructed drive-in theatre, the Belair Drive-in, some eleven miles way from the California Theatre. [Complaint, R. 15-16.]

(b) That in an action entitled *United States v. Para-mount Pictures Inc., et al.*, Eq. No. 87-273 in the United States District Court for the Southern District of New York, brought by the United States against the major

distributors[3] in the United States, for violation of the antitrust laws, there were established judicial definitions as well as judicial restrictions on the use of "clearance" in the motion picture business. Clearance in the motion picture business, it was alleged was defined "as the period of time usually stipulated in license contracts which must elapse between runs of the same picture within a particular area or in specified theatres." [Complaint, R. 13.]

(c) That in that action, *United States v. Paramount Pictures, Inc., et al., supra*, decrees were entered against these designated distributors in which, among other things, said distributors were enjoined

> "From granting any clearance between theatres not in substantial competition.
>
> "From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonable and necessary to protect the licensee in the run granted."[4]

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[3]The distributors, as designated in the complaint in this action, included Paramount Pictures, Inc., RKO Pictures, Inc., Warner Bros. Pictures, Inc., 20th Century-Fox Film Corp., Columbia Pictures Corp., Universal Film Exchanges, Inc., Loew's, Inc., and United Artist Corp. [R. 11.] See *United States v. Paramount Pictures, Inc., et al.*, 66 Fed. Supp. 323, 334 U. S. 131, 85 Fed. Supp. 881.

[4]The complaint alleged that in the *Paramount* case, the decrees provided that the court retained jurisdiction "for the purpose of requiring any of the parties to this decree, and no others, to apply to the court at any time for such orders or direction as may be necessary or proper for the construction, modification or carrying out of the same, for the enforcement or compliance whatever or for infringement for violations thereof or for other and further relief." [Complaint, R. 15.]

The complaint also alleged that in the opinion in the *Paramount* case, the court had stated that the decisions whether in any particular case unreasonable clearances have been or are being imposed and whether clearances as between theatres which are not in substantial competition to each other have been or are being imposed should be let to local suits in the area concerned. [Complaint, R. 14.]

The Allegations of Opposing Contentions and Impending Legal Controversy.

It was alleged:

(a) That prior to filing the complaint, the designated stributors had licensed or offered to license to Fox 'est Coast for its California Theatre in San Bernardino, otion pictures distributed by them on *first run* in the an Bernardino competitive area and that they had therefore granted, after negotiation, to Fox West Coast, r said theatre, a reasonable period of *clearance* or protion before the same picture was licensed for subseuent run exhibition in said area; that the right to neotiate for first run and for clearance over subsequent xhibition was a valuable property right, the deprivation f which would result in a substantial amount of moneary damage and loss to Fox West Coast. [Complaint, . 15-16.]

(b) That petitioner had recently opened its drive-in eatre eleven miles from the Fox West Coast California heatre, but it was alleged, within the San Bernardino competitive area."[5]

(c) That "an actual controversy relating to the legal ights and liabilities of plaintiff (Fox West Coast), and lefendant (petitioner) exists and arises out of the follow-ng facts." These facts, it was alleged were:

(1) That petitioner contended that its new Belair Drive-in Theatre was *not* in substantial competition with Fox West Coast's California Theatre or with other theatres in that area, and that, therefore, petitioner contended that Fox West Coast was not en-

[5]It was also alleged that there were other theatres within twelve miles of the Fox West Coast Theatre which were also within the an Bernardino "competitive area." [Complaint, R. 16.]

titled to negotiate with the distributors for clearance in favor of the Fox West Coast Theatre over petitioner's Belair Drive-in; that petitioner contended that it was entitled, therefore, to exhibit motion pictures at the same time, *i.e.*, simultaneously with Fox West Coast's California Theatre in San Bernardino, eleven miles distant. [R. 17.]

(2) That in conflict with these contentions by petitioner, Fox West Coast contended that its California Theatre in San Bernardino was substantially competitive with petitioner's newly constructed Belair Drive-in and that all other theatres in the area were mutually substantially competitive to an extent justifying the granting of clearance to one theatre over others within the purview of the opinion and findings of the special expediting court in *United States v. Paramount, et al.*; that consequently, the granting of clearance by the distributors would not be within the injunctive provisions against granting of any clearance to theatres not in substantial competition within the meaning of the consent decrees and final decrees in the *Paramount* case. [R. 17.]

(3) That Fox West Coast contended that it had an equal right with petitioner to negotiate with each distributor independently for a prior run for its theatre in San Bernardino ahead of any other theatre, including petitioner's Belair Drive-in, and that there was no obligation on the part of any distributor in such a case to grant an equal and simultaneous run to petitioner's Belair Drive-in Theatre. [R. 17.]

(4) That petitioner, in addition to contending that it was not in substantial competition with the other theatres, referred to by Fox West Coast, had threat-

ened Fox West Coast and had stated to Fox West Coast in "substance and effect" that it had threatened the distributors that "if plaintiff's (Fox West Coast) California Theatre is granted any clearance over defendant's Belair Theatre, or is granted a prior run, such action on the part of plaintiff (Fox West Coast) will be deemed by plaintiff (petitioner) to be an overt act in concert with any distributor who may grant plaintiff such clearance or prior run in restraint of trade and in violation of the Sherman Antitrust Act, and of the decrees of the Special Expediting Court in *United States v. Paramount Pictures, Inc., et al.*, and that plaintiff will be subjected to an action by petitioner for treble damages under Sec. 4 of the Clayton Act (Title 15 U. S. C. Sec. 15." [R. 17-18.]

(5) That "said" threats and duress and coercion upon the distributors arising out of and resulting from said threats of litigation threatened and had, in fact, deprived Fox West Coast of the right to negotiate for motion pictures upon first run and to negotiate for clearance over competitive theatres including petitioner's Belair Drive-in Theatre. [R. 18.]

(6) That Fox West Coast was without any speedy or adequate remedy at law and would be irreparably harmed unless the petitioner was restrained and enjoined from instituting any action under the antitrust laws against plaintiff (Fox West Coast) and said distributors or any of them based upon the facts alleged, during the pendency of the action, and until such time as the court should determine whether or not the plaintiff and defendant had an equal and correlative right to license a prior run with clearance on behalf of their respective theatres. [R. 18.]

D. The Prayer for Declaratory Relief.

The complaint set forth its prayer for judgment. The prayer sought a declaration that:

1. The granting of clearance between theatres on first run in the San Bernardino competitive area, and particularly between Fox West Coast's California Theatre and petitioner's Belair Drive-in Theatre "is reasonable and is not in violation of the anti-trust laws or of the decrees of *U. S. vs. Paramount,* et al."

2. That the distributors are and each of them is entitled to negotiate with Fox West Coast and petitioner and with the other owners and operators of theatres in said competitive area equally for a prior run in said competitive area.

3. That the court declare such other rights or duties as may be necessary or proper in respect to the controversy alleged.

4. That pending final decision of the court, petitioner, Beacon Theatres, Inc., be *restrained and enjoined "from commencing any action under the anti-trust laws of the United States against plaintiff (Fox West Coast) and against the distributors arising out of the facts or controversies alleged."*

The prayer then requested that the court give such other relief, equitable or otherwise, as the court deemed proper or necessary and then sought costs. [Complaint, R. 18-19.][6]

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[6]Petitioner's motion to dismiss the complaint upon the grounds that said complaint was in excess of the jurisdiction of the Federal Courts because it did not show a case or controversy, as required by Article III, Sec. 2 of the Constitution of the United States, was denied on January 17, 1957. [R. 21.] Thereafter, the real party in interest, Pacific Drive-in Theatres, Inc., intervened as a defendant. [R. 22.]

E. Proceedings Subsequent to the Filing of the Complaint.

No action to obtain a *pendente lite* injunction against petitioner's filing of the antitrust case was taken by Fox West Coast. Thereafter, on February 18, 1957, as anticipated by the complaint, petitioner filed its answer, affirmative defense and counterclaim, in which it sought damages under Title 15 U. S. C. 15 for damage to its business resulting from violations of the antitrust laws. Petitioner's pleading alleged:

(a) that petitioner's Belair Drive-in Theatre was not in substantial competition with any of the theatres of Fox West Coast [R. 39];

(b) that Fox West Coast and Pacific Drive-in Theatres Corporation, and certain other designated corporations, were engaged in a combination conspiracy to restrain and monopolize the exhibition of motion pictures in the San Bernardino area [R. 39];

(c) that said parties had agreed, pursuant to that conspiracy, to prevent Petitioner's Belair Theatre from obtaining the privilege of exhibiting motion pictures on a first-run availability, simultaneously with the exhibition of said motion pictures in the theatres of Fox West Coast, Pacific Drive-in and others [R. 40];

(d) that the continued granting of clearance to Fox West Coast over Petitioner's Drive-in Theatre, and the prevention of Petitioner's Belair Theatre, from exhibiting motion pictures simultaneously with the theatres of Fox West Coast and others, was a practice carried on pursuant to and part of a conspiracy to restrain the business of Petitioner in operating the Belair Drive-in Theatre. [R. 40.]

Petitioner, pursuant to Rule 38 of the Federal Rules of Civil Procedure, filed and served a timely demand for jury trial as to all issues of the complaint, answer and counterclaim. [R. 43.]

On motion of Fox West Coast, and over the objection of petitioner, the respondent, on March 21, 1957, entered an order

(a) striking Petitioner's Demand for Jury Trial as to the complaint and answer;

(b) striking the portions of Petitioner's answer and affirmative defense relating to antitrust violations by Fox West Coast;

(c) directing that trial be held by the court alone on all of the issues in the complaint, including the issues in the complaint which were common to Petitioner's antitrust defenses and counterclaim, and that only after such trial that Petitioner be permitted to try the remaining issues set forth in the counterclaim to a jury. [R. 51.]

After the entry of this order, Petitioner filed an original application in the Court of Appeals seeking a Writ of Mandamus directed to the respondent Judge, requiring him to enter an order dismissing the complaint as being in excess of the jurisdiction of the United States District Court or, in the alternative, to vacate the order described above and to enter an order directing respondent to proceed with the jury trial of all issues of the complaint, answer and counterclaim triable to a jury prior to or simultaneously with the trial by the court of any issues properly triable by the court alone.[7]

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[7]This is the procedure approved and required by Judge Stanley Barnes, dissenting in *Institutional Drug Distributors v. Yankwich* (C. C. A. 9, 1957), 249 F. 2d 566, 571.

In its petition to the Court of Appeals, Petitioner alged the facts hereinbefore described. Petitioner alleged at respondent's order striking petitioner's demand for ry trial as to the complaint and answer, striking the ntitrust defenses of petitioner's answer, and ordering trial without jury of the complaint, before the trial of e issues in the counterclaim, unlawfully deprived petiner of his right to jury trial under the Seventh Amendent to the Constitution of the United States, and Rules 8 and 57 of the Federal Rules of Civil Procedure of the ollowing matters, at least, raised by the complaint:

(a) The existence of substantial competition between Petitioner's Belair Drive-in Theatre and Fox West Coast's California Theatre;

(b) The existence of unreasonable clearance between said theatres;

(c) The relative desirability of said theatres to distributors of motion pictures as outlets for first run feature motion pictures;

(d) Whether in fact requests were made by theatres for first run availability and clearance from the various motion picture distributors.

Petitioner alleged that under the principles of estoppel r *res adjudicata*, a prior determination by the trial court without a jury would bar a subsequent jury determinaion of these common issues, and that, therefore, a respondent's order striking its jury demand and directing he prior court trial of the common issues unlawfully deprived petitioner of its right to jury trial of its counterclaim. The Petition for Writ of Mandamus also asserted hat jurisdiction of the subject matter was lacking.[8] [R. 1.]

[8]In the Court of Appeals, respondent filed a response. As stated by the Court of Appeals, no issue of fact with respect to the petiion of Writ of Mandamus was raised by the respondent. [R. 108.]

The Court of Appeals determined certain questions of law adversely to petitioner, which questions of law will be hereinafter described, and then held that it did not reach the question of the issuance of the Writ of Mandamus, and denied the petition. [R. 125.]

The Opinion of the Court of Appeals.

In its opinion, the Court of Appeals laid down rules relating to the interpretation of the Seventh Amendment, and Rules 57, 38, 42, and 18 of the Federal Rules of Civil Procedure, which have great impact upon the administration of these provisions of law in the Federal courts.

1. The Court held that although a litigant cannot be deprived of a right to jury trial as to substantial issues by the device of a prospective defendant filing a suit for declaratory judgment raising those issued, by reason of Rule 57 of the Rules of Civil Procedure, and the Seventh Amendment, that result can be accomplished if the complaint for declaratory judgment adds allegations of threats of litigation and irreparable injury arising therefrom. Thereby, the Court held, the complaint for declaratory judgment is converted into an "action in equity for an injunction against threats of litigation." Thereafter, the trial court has discretion to order that equity trial first under Rule 42(b) of the Federal Rules of Civil Procedure.

2. The Court held that Rule 42(b) of the Federal Rules of Civil Procedure gives the Federal Court a right to apply this procedure of preemption to a complaint seeking an injunction against threatened jury trial actions for damages even where the complaint is in essence nothing more than a defense to or denial of issues in that impending action.

3. The Court held that in a civil action involving a claim which, before the Federal Rules, would have been denominated a bill in equity, which claim is joined or consolidated with a claim which, before the Federal Rules, would have been denominated a suit at law, both claims including common substantial questions of fact, the Federal Court has discretion to deprive either party of a properly demanded jury trial upon that common question of fact by proceeding, under Rule 42(b), to a previous disposition of the so-called equitable claim, and so causing that fact to become *res judicata*. The Court held that this result could be attained under Rule 42(b) even in a case in which the so-called "equitable" claim was for a declaration of nonliability and an injunction against the filing of the legal claim. The Court further held that under the Federal Rules of Civil Procedure, Rule 42(b) may be applied, without limitation by or consideration of the right to a jury trial under the Seventh Amendment, or as guaranteed by Rule 38(a) of the Rules of Civil Procedure.

Summary of the Argument.

A fair analysis of the Complaint, based upon its express allegations and its prayer, clearly establishes that it was a complaint seeking a determination of nonliability under the antitrust laws and was in the nature of a suit for Declaratory Judgment. The complaint alleged that Fox West Coast contended it had an absolute right to negotiate for an exclusive run and clearance over petitioner's theatre, eleven miles away, in the same manner as it, Fox West Coast, had obtained an exclusive run and clearance over other theatres for many years theretofor. The complaint alleged that petitioner contended that if the dis-

tributors of motion pictures granted an exclusive run and clearance to Fox West Coast over petitioner's theatre, that such exclusive run and clearance would violate the anti-trust laws as an unreasonable restraint of trade because the theatres were not in substantial competition with each other. The complaint alleged that petitioner desired to exhibit pictures simultaneously with Fox West Coast. It was this dispute, the complaint alleged, which formed the basis of the complaint for Declaratory Judgment. The complaint alleged that petitioner had warned of an anti-trust damage suit by reason of its belief that contracts for an exclusive run and clearance over theatres not in substantial competition constituted an unreasonable restraint of trade. These allegations in the complaint were necessary to the complaint in order to show a "case or controversy" within the meaning of Article Three of the Constitution of the United States.

As a party to a suit for Declaratory Relief, filed in anticipation of and as a substitute for a suit for damages under the antitrust laws, petitioner was entitled to have the issues tried to a jury in the same way as the antitrust damage suit would have been tried to a jury.

The lower court's ruling that the allegations of the complaint were analogous to a suit to enjoin threats of legal action was erroneous since historically such a bill in equity required positive affirmative allegations showing that the threats were made by one who did not intend to test his right in court. The complaint affirmatively shows that petitioner was anxious to test its claim in court.

but that it was Fox West Coast who sought to enjoin such a test. The allegations of dispute and controversy as to the existence or non-existence of substantial competition affirmatively show the existence of good faith with respect to petitioner's claims.

Whether considered as a complaint for Declaratory Relief or as a complaint to enjoin a suit at law, the adjudication sought and directed by the courts below was an adjudication as to the liability or nonliability of Fox West Coast under the antitrust laws. As part of petitioner's counter claim, these same issues are raised for determination by a jury. The basic issues are, therefore, issues triable to a jury. Rule 42(b) permits the trial court to separate these issues for trial. The jury can be required to try separately those issues which should be tried separately in the interest of justice. Equitable issues, if any, may be tried to the court, but in this case Rule 42(b) cannot be converted into a technique for destroying petitioner's right of trial by jury by labeling all of the issues in the complaint as equitable and preempting the trial of those issues by the court alone. The importance of the policy represented by the Seventh Amendment precludes this result.

ARGUMENT.

A.

A Suit for Declaratory Judgment, Which Is Filed in Anticipation of and as a Substitute for a Suit for Damages Under the Antitrust Laws, Wherein a Litigant Would Have a Right to Jury Trial Is Triable to a Jury, Upon Demand, Under the Seventh Amendment to the Constitution of the United States and Rule 57 of the Federal Rules of Civil Procedure.

This Court has not yet had occasion to determine the principles of law applicable to the decision of the mode of trial in declaratory judgment actions. In *Aetna Life Insurance v. Haworth*, 300 U. S. 227, that question was not presented for decision, and this Court, therefore, left it unanswered.

Even before the adoption of the Federal Rules of Civil Procedure, and particularly before the adoption of Rule thereof, it was agreed that a suit for declaratory judgment was neither "legal" nor "equitable." It is a procedural "neutral" in the family of remedies. When originally adopted, the Federal Declaratory Judgment Act stated "When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not." (*Federal Declaratory Judgment Act*, (Act of June 14, 1934, 48 Stat. at Large 955, Chap. 912; Judicial Code, Sec. 274D.; 28 U. S. C., Sec. 400.) The

Judicial Code of 1948 did not carry forward the above provision, but the revisors notes to new Section 2202 of Title 28 state that:

> "Provisions relating to submission of interrogatories to a jury were omitted as covered by Rule 57 of the Federal Rules of Civil Procedure."

Rule 57 states: "The right to jury trial may be demanded under the circumstances and in the manner provided by Rules 38 and 39." Rule 38, declares that "the right of trial by jury as declared by the Seventh Amendment of the Constitution, or as given by a statute of the United States, shall be preserved to the parties inviolate." This statutory chain demonstrates a neutrality with respect to right of jury trial in declaratory judgment actions in order to permit the full development of this important procedural remedy within the framework of our Constitutional system.

It should be noted that 28 U. S. C. 400 clearly anticipated that there might be actions for declaratory relief wherein separate issues of fact would be triable by jury, while other facts might be triable by the Court. This Court has recognized that this is the correct analysis in all actions under the Federal Rules. (*United States v. Yellow Cab*, 340 U. S. 543, 556.)

The Courts have, however, uniformly agreed that a prospective defendant may not employ this procedural device to anticipate actions for which a jury trial would have been granted by filing such a declaratory relief suit and then arguing that the action is essentially an "equitable" one, and thereby destroying the right of jury trial. Had prospective defendants met with success in this area, doubtless this Court would have long since found the

Seventh Amendment to be an impenetrable bar to such easy destruction of the right of jury trial. The prospective defendant, Professor Borchard notes, cannot defeat the right of jury trial by rushing into court with an action for declaratory judgment.

The proceedings below, and particularly, the complaint itself, attempted to make use of the declaratory judgment procedure. The complaint asserts that it is a complaint for declaratory judgment. [R. 10.] It alleges that it is brought pursuant to the Federal Declaratory Judgment Act to have the Court declare the rights and obligations of the parties under the facts set forth. [R. 11.] It alleges facts showing that the parties differed in their claims as to the existence or non-existence of substantial competition between their theatres and differed as to their opinion as to whether or not the granting of clearance between their theatres would constitute a violation of the antitrust laws or would constitute a contempt of the decree in the *Paramount* case. [R. 16-17.]

All of these allegations are contained in Paragraphs I through XI of the complaint. It is obvious, of course, that had the complaint stopped there, it would have been subject to a most apparent deficiency under the Constitution of the United States. A claim that two theatre owners who have no other relationship to each other except that they operate within 11 miles of each other, and differ in their contentions as to whether they are competitive or whether certain action by third parties, *i.e.*, distributors, would constitute a contempt of another court's decree or would constitute a violation of the antitrust laws could not stand muster under the "case or controversy" require-

Borchard, Declaratory Judgments, p. 400.

ment of Article III of the Constitution under the most friendly application of that limitation.[10] Such facts could not constitute a sufficient claim of right to create a legal case or controversy justifying judicial action. Only the Attorney General may seek a remedy by way of contempt in the United States District Court for the Southern District of New York. A claim by petitioner to the distributors of motion pictures that the distributors' action constituted a contempt, would surely be a claim both useless and frivolous. Even more clearly, a claim by the petitioner that action which might be taken by the distributors constituted a violation of the antitrust laws would be utterly unenforceable by the petitioner, since the United States alone may enforce the antitrust laws. Thus, had the complaint stopped at Paragraph XI, it must surely have been dismissed.

In examining Paragraph XII of the complaint, it is therefore crucial to recognize that in a Declaratory Relief suit, wherein the declaration sought is, as here, a declaration of nonliability, some claim of right is essential.[11] There can be no doubt that the pleading here sought only such a declaration. It specifically requested a declaration that an exclusive first run and clearance would not violate the equity decree in the *Paramount* case, and would not violate the anti trust laws. [R. 18-19.] The request that the Court declare that third parties, *i.e.*, distributors, had the right to license an exclusive first run with clearance is simply flipping the procedural coin which upon its face requests a declaration of nonliability. Thus the allegations

[10]Borchard, Declaratory Judgments, 2d Ed., p. 400.

[11]Borchard, Declaratory Judgments, p. 43; *Dewey and Almy v. Chemical Corp. of America* (C. C. A. 3, 1943); *Arlac v. Hat Corporation of America* (C. C. A. 3, 1948), 166 F. 2d 286.

of threats of a damage suit in Paragraph XII were precisely for the purpose of meeting the "case or controversy" test of Article III of the Constitution.

Of course, this Court has long held that an action for Declaratory Relief does not require allegations of irreparable injury or inadequacy of legal remedy. (*Aetna Life Ins. v. Haworth*, 300 U. S. 227; Borchard, *Declaratory Judgment*, p. 239.) Those allegations, in Paragraph XII, were, therefore, surplusage in so far as declaratory relief was called for. The complaint was nothing less and nothing more than a complaint for declaratory judgment.

The courts have generally recognized and upheld the right to jury trial in declaratory relief actions as to those issues in regard to which either party could have claimed a jury in any action for which the declaratory judgment may be regarded as a substitute. The cases in point are cited in the margin.[12]

The complaint shows that Fox West Coast anticipated petitioner's suit for damages under the antitrust laws. The proof is in the express language of Paragraph XII. It says:

> "The defendant, in addition to contending that its said Bel Air Drive-In Theatre is not substantially

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[12] *Aetna Cas. & Surety Co. v. Quarles* (C. A. 4th S. C., 1937), 92 F. 2d 321; *Maryland Cas. Co. v. Sammons* (C. A. 5th Ga., 1938), 99 F. 2d 323, *cert. den.* 306 U. S. 633, 83 L. Ed. 1035, 59 S. Ct. 463; *United States Fidelity & G. Co. v. Koch* (C. A. 3d Pa., 1939), 102 F. 2d 288; *Pacific Indem. Co. v. McDonald* (C. A. 9th Or., 1939), 107 F. 2d 446, 131 A. L. R. 208; (*American*) *Lumbermens Mut. Cas. Co. v. Timms & Howard* (C. A. 2d N. Y., 1939), 108 F. 2d 497; *Great Northern L. Ins. Co. v. Vince* (C. A. 6th Mich., 1941), 118 F. 2d 232, *cert. den.* 314 U. S. 637, 86 L. Ed. 511, 62 S. Ct. 71; *Beumit Mills, Inc. v. Eday Fabric Sales Corp.* (C. A. 2d N. Y., 1942), 124 F. 2d 563; *Hargrove v. American Cent. Ins. Co.* (C. A. 10th Okla., 1942), 125 F. 2d 225; *Williams v. Employers Mut. Liability Ins. Co.* (C. A. 5th Ala., 1942), 131 F. 2d

competitive with any other theatre in the San Bernardino area on first run exhibition in said area, has threatened plaintiff and has stated to plaintiff in substance and effect that it has threatened the distributors, above mentioned, that if plaintiff's said California Theatre is granted any clearance over defendant's Bel Air Drive-In Theatre, or was granted a prior run, said action on the part of plaintiff would be deemed by defendant to be an overt act in concert with any distributor who may grant such clearance or such priority of run in restraint of trade and a violation of the Sherman Anti-Trust Act and of the decrees of the Special Expediting Court in the *United States v. Paramount Pictures, Inc., et al.,* and that plaintiff would be subjected to an action by said defendant for treble damages under Section 4 of the Clayton Act. (Title 15, U. S. C. Sec. 15.)" [R. 17-18.]

Fox West Coast sought to forestall this suit for damages at law under the antitrust laws by its suit for declaratory judgment. The proof is in the prayer which says:

"'That pending final decision of the Court herein, defendant, Bacon Theatres, Inv., and its officers, agents and employees, be restrained and enjoined from commencing any action under the antitrust laws

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601; *Piedmont F. Ins. Co. v. Aaron* (C. A. 4th Va., 1943), 138 F. 2d 732, *cert. den.*, 321 U. S. 789, 88 L. Ed. 1079, 64 S. Ct. 789; *Dickinson v. General Acci. F. & L. Assur. Corp.* (C. A. 9th Cal., 1945), 147 F. 2d 396; *General Acci. F. & L. Assur. Corp. v. Schero* (C. A. 5th Fla., 1945), 151 F. 2d 825; *Lumber Mut. Cas. Ins. Co. v. Stukes* (C. A. 4th S. C., 1947), 164 F. 2d 571; *United States Fidelity & G. Co. v. Nauer* (D. C. Mass., 1941), 1 F. R. D. 547; *Eastman Kodak Co. v. McAuley* (D. C. N. Y., 1941), 2 F. R. D. 21; *Allstate Ins. Co. v. Cross* (D. C. Pa., 1941), 2 F. R. D. 120; *Ryan Distributing Corp. v. Caley* (D. C. Pa., 1943), 51 Fed. Supp. 377; *United States Fidelity & G. Co. v. Janich* (D. C. Cal., 1943), 3 F. R. D. 16; *Binger v. Unger* (D. C. N. Y., 1946), 7 F. R. D. 121; *North American Philips Co. v. Brownshield* (D. C. N. Y., 1949), 9 F. R. D. 132.

of the United States against plaintiff and against the distributors hereinabove named, or any of them, arising out of the facts or controversies between the parties herein alleged." [R. 18.]

It has been long established that an action for damages under the Sherman Act, upon timely demand, is triable by a jury.

Fleitman v. Wellsbach Street Lighting Co. of America, 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505;

Cf. Bigelow v. RKO Radio Pictures, 327 U. S. 251, 254, 66 S. Ct. 574, 90 L. Ed. 652.

Such actions for damages in the motion picture industry cases, almost without exception, involve, among other issues, the factual issues of (a) substantial competition; (b) unreasonable clearance; (c) comparability of theatres; and (d) demand for disputed runs. Where a jury has been demanded, all of these issues have been jury issues in the damage cases under the Sherman Act.

J. J. Theatres, Inc. v. 20th Century-Fox Film Corp. (C. C. A. 2nd), 212 F. 2d 840 (*re* issue of substantial completion);

20th Century-Fox Film Corporation v. Brookside Theatre Corp., 194 F. 2d 846 (*re* issue of unreasonable clearance);

Loew's, Inc. v. Milwaukee Town Corp., 201 F. 2d 19 (*re* issues of demand and comparability of theatres, jury apparently waived).

Thus, it is apparent that the complaint for declaratory relief and the motion to strike petitioner's demand for jury trial by Fox West Coast, were a patent attempt to avoid a trial by jury which, however, is unavailing to Fox West Coast by reason of the foregoing principles of law.

B.

A Complaint for Declaratory Relief Which Also Seeks an Injunction Against Threats of Litigation Is Triable to a Jury. Prior to the Adoption of the Federal Rules, the Complaint Herein, as a Bill in Equity, Would Have Been Dismissed Since It Failed to Show That Petitioner Did Not Intend to Follow Up the Threats With a Test of His Right in Court. Moreover, After the Filing of the Counter Claim, the Remedy at Law Was Adequate.

The Court below in analyzing the complaint for declaratory judgment, fell into error when it held that the allegations of Paragraph XII of the complaint converted what was otherwise clearly an action for declaratory judgment into an action to enjoin threats of a damage suit which, prior to the Rules, would have been, the Court said, "A suit within the exclusive jurisdiction of a Court of Equity." [R. 123.] The unwillingness of the Court to recognize the overwhelming declaratory relief thrust of the allegations of the complaint and the prayer for final relief, is apparent from its opinion. In fact, to convert the character of the complaint, the Court was even willing to "assume" that the complaint sought an injunction against threats of litigation which were nowhere pleaded; and was willing to amend the complaint on the appeal, to include allegations that petitioner threatened the distributors with an antitrust case when, again, no such allegations appear in the complaint. [R. 112, footnote 6.] But even with this assumption and amendment, the complaint failed to state a claim which would have been cognizable "in equity".

An equitable claim was not stated because the complaint failed to allege that the threats of a damage suit

were made without the intent to follow with an actual suit in the courts. Further, the complaint affirmatively demonstrated that petitioner was anxious to sue, and that Fox West Coast sought to prevent the test of petitioner's antitrust suit.

In the area of equitable relief, it was established long before 1938 that

> "It is not an actionable wrong when one in good faith makes complaint to whoever he will that it is his purpose to insist upon what he believes to be his legal rights, even though he may misconceive what those rights are."
>
> *Eastern Petroleum Co., Inc. v. Asiatic Petroleum Corp.* (2 Cir.), 103 F. 2d 315.

The rule is well illustrated in patent cases. In *Virtue v. Creamery Package Mfg. Co.* (C. C. A. 8, 1910), 197 Fed. 115, it was urged that a threat of a patent infringement suit which interfered with a third party's interest, gave rise to an actionable claim. The Court of Appeals held:

> "That the owner of a patent may notify infringers of its claims, and warn them unless they desist, suits will be brought to protect him and his legal rights, is sustained by numerous decisions. *Kelley v. Ypsilanti Press Stay Mfg. Co.* (C. C.), 44 Fed. 19, 10 L.R.A. 686; *Computing Scale Co. v. National Computing Scale Co.* (C. C.), 79 Fed. 962; *Farquhar Co. v. National Harrow Co.*, 102 Fed. 714, 42 C. C. A. 600, 48 L. R. A. 755; *Adriance Platt & Co. v. National Harrow Co.*, 121 Fed. 827, 58 C. C. A. 163; *Warren Featherbone Co. v. Landauer* (C. C.), 151 Fed. 130; *Mitchell v. International, Etc., Co.* (C. C.), 169 Fed. 145, Thirty Cyc. 1054.

"The only limitation to issue such warnings is the requirement of good faith. There is nothing in the warnings given in this case to show that letters of warnings were false, malicious, offensive, opprobrious, or that they were used for the willful purpose of inflicting injury. In such a case, it was said in *Kelley v. Ypsilanti, supra:*

"It would seem to be an act of prudence, if not of kindness, upon the part of the patentee, to notify the public of his invention, and to warn persons dealing in the article of the consequence of purchasing from others. *Chase v. Tutle* (C. C.), 27 Fed. 110; *Boston Diatite Co. v. Florence Mfg. Co.*, 114 Mass. 69 (19 A. R. P. 310); *Kidd v. Horry*, 28 Fed. 773.

"There is nothing in this case to indicate that any of the warnings issued by the defendants were made in bad faith, and that they were not promptly followed by the institution of the infringement suits. In issuing notices and warnings, we think the defendants were acting within their legal rights. If they had the right to bring the suits, they had the right to issue the warnings. It may be, and probably is, true that the tendency of these suits resulted in some damage to the plaintiffs in lessening the sale of the challenged device; but such damage was an incident of the suits, and cannot be made the basis of a recovery."

The decree of the Court of Appeals was affirmed in this Court, in *Virtue v. Creamery Package Mfg. Co.*, 227 U. S. 8, 37-38, where the Court said:

"Patents would be of little value if infringers of them could not be notified of the consequence of infringement or proceeded against in the courts. Such action considered by itself cannot be said to be illegal."

Indeed, in the early case of *Kidd v. Horry*, 28 Fed. 773, Justice Bradley had before him this question:

> "We are asked to grant injunction in this case to restrain the defendants from publishing certain circular letters which are alleged to be libelous and injurious to the patent right and business of the complainants, and from making and uttering libelous or slanderous statements, written or oral, of or concerning the business of the complainants or concerning the validity of their letters patent, or of their title thereto, pending the trial and adjudication of the principal suit, which is brought to restrain the infringement of said patents."

Justice Bradley denied the injunction. He held that on the basis of statutory changes in the law of England that such an injunction might issue out of courts in that country, but he said:

> "Neither the statutory law of this country, nor any well-considered judgment of the courts, has introduced this new branch of equity into our jurisprudence."

Justice Bradley went further. He stated that "the law was clearly that the Court of Chancery will not interfere by injunction, to restrain the publication of a libel," as was distinctly laid down by Lord Chancellor Cairns in the case of *Prudential Insurance Co. v. Knott*, 10 Chancery Appeals 142, where he says, in reference to the application of an injunction to restrain a libel, calculated to injure property:

> "Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction."

The rule of law wherein Courts of Equity had no power to issue injunctions against threats of suits at law unless there were positive, affirmative, allegations of fact showing the unwillingness to sue, is even more clearly demonstrated by the leading case of *Emack v. Kane*, 34 Fed. 46. There, the Court granted an injunction because of the presence of such allegations, and distinguished *Kidd v. Horry, supra*, by holding that the gravamen of the action in the *Emack* case was an attempted intimidation of the complainant's customers by threatened suits *which defendants did not intend to prosecute*. In a case involving a counterclaim which sought a declaration of patent invalidity and also alleged threats of litigation by the patentee resulting in damage, Judge Learned Hand held that, although the complaint sought an injunction against threats to the counter-claimant's customers, such threats did not change the nature of the claim from a suit for Declaratory Relief to an injunctive suit. Judge Hand said: "Such threats gave rise to a cause of action only in case the party refuses to test his right in court."

Leach v. Ross Heating & Mfg. Co. (C. C. A. 2, 1931), 104 F. 2d 88.

The allegations in the instant complaint, of course, demonstrate that it was *petitioner* who was anxious to test its right to make the antitrust claims in court, and it was *Fox West Coast* whose desire it was to preclude such a test. Further, the good faith of petitioner's claim is affirmatively demonstrated by the complaint itself, when it alleges that the parties are in dispute as to whether their theatres are in substantial competition. The fact the theatres were eleven miles apart certainly, as a matter

of common sense, provides reasonable foundation for petitioner's claim.[13]

But the deficiency in the complaint, as an equitable claim, is even more complete. The Court below assumed that had petitioner's counterclaim been filed prior to the filing of the complaint, Fox West Coast in any event would have had an adequate remedy at law by denying and defending the allegations in petitioner's antitrust suit. The Court held that the filing of the counterclaim 90 days later did not make the remedy adequate, as a matter of law, because, the Court ruled, under all circumstances, adequacy must be tested at the time of the filing of a complaint. In this holding, the Court was in clear error.

It was well established by the decisions of this court prior to the adoption of the Federal Rules of Civil Procedure that when a defense could be interposed to an action at law and such action was *imminent* or pending, there was no occasion for equitable relief and the parties were left to their rights at law. In such a case, the bill was dismissed without prejudice, not because there was a want of jurisdiction in the Federal Court, but because the plaintiff had made no case for equitable relief.

In *Phoenix Mutual Life Ins. Co. v. Bailey* (1871), 13 Wall. 616, 80 U. S. 616, 20 L. Ed. 501, an insurer sued to cancel policies for fraud. An action at law later was

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[13]The lack of good faith on the part of Fox West Coast can best be demonstrated by the fact that this suit for declaratory judgment was filed, and the charge of irreparable injury made, before such a charge could possibly have been proven. The complaint was filed on November 2, 1956. The allegation is admitted that petitioner's theatre was opened during the month of November. [R. 39.] Thus, on the face of the pleadings, Fox West Coast would have had exactly one day's experience with the results of actual exhibition in order to substantiate its claim of "irreparable injury."

begun to recover on them. This court's decision sustained dismissal of the bill, because the insurer had a complete remedy by way of defense in the action at law and the claimant on the policy had a right to trial by jury. See also, to the same effect: *Adamos v. N. Y. Life Ins. Co.* (1935), 293 U. S. 386, 55 S. Ct. 315, 79 L. Ed. 444; *Enlow v. N. Y. Life Ins. Co.* (1935), 293 U. S. 379, 55 S. Ct. 310, 79 L. Ed. 440; *Cable v. U. S. Life Ins. Co.* (1903), 191 U. S. 288, 24 S. Ct. 74, 48 L. Ed. 188.)

Thus, in *Di Giovianni v. Camden Fire Insurance Association,* 296 U. S. 64, 80 L. Ed 47, this Court said:

> "While equity may afford relief quia timet by way of cancellation of a document if there is a danger that the defense to an action at law upon it may be lost or prejudiced no such danger is apparent where, as respondent's bill affirmatively shows, the loss has occurred and suits at law on the policies are imminent and there is no showing that the defense cannot be set up and litigated as readily in a suit at law as in equity. . . . . the grounds for relief for a single plaintiff which will deprive two or more defendants of their right to a jury trial must be real and substantial and its necessity must affirmatively appear (citing cases). Respondent's bill of complaint does not show that petitioners are unwilling to abide the result of a trial of one suit as controlling both."

And after the adoption of the Federal Rules of Civil Procedure, this court's ruling in these cases was continued. (*Atlas Life Ins. Co. v. W. I. Southern, Inc.*, 306 U. S. 563, 59 S. Ct. 657, 661, 83 L. Ed. 987; *Ettleson v. Metropolitan Life Ins. Co.*, 317 U. S. 188, 63 S. Ct. 163, 87 L. Ed. 170. See also *Prudential Insurance v. Saxe,* 134 F. 2d 16.)

C.

Where an Action Involves Separate Trials, One by the Court and One by the Jury, and Common Basic Issues of Fact Exists, the Right to Jury Trial Under the Seventh Amendment May Not Be Defeated by the Prior Trial by the Court of These Common Basic Issues. Rule 42(b) of the Federal Rules of Civil Procedure Neither Requires nor Permits This Result.

In *Leimer v. Woods,* 196 F. 2d 828, the Court of Appeals for the Eighth Circuit held that in an action involving joined or consolidated equitable and legal causes of action, involving a common substantial question of fact, a Federal Court could not, under the Rules of Civil Procedure and the Seventh Amendment, deprive either party of a properly demanded jury trial upon that question by proceeding to a previous disposition of the equitable cause of action and so cause the fact to become *res judicata,* except for special or impelling reasons which would overcome basic constitutional procedural rights. In *General Motors Corp. v. California Research Corp.,* 9 F. R. D. 965, in an action in which the plaintiff sought a declaratory judgment and an injunction restraining the bringing or the threatening of suits at law and defendant filed a counterclaim for damages, the court held that since the basic issues were legal issues, such basic issues formerly triable as of right by a jury were still triable by a jury as a matter of right.[14]

[14]This was the view of the Court of Appeals for the 9th Circuit prior to *Tanimura supra.* In *Bruckman v. Holzer* (C. C. A. 9, 1946), 152 F. 2d 730, Chief Judge Denman held that where common substantial issues are raised in claims formerly denominated legal and equitable, that the preservation of the right to jury trial, guaranteed by Rule 38A, and the Seventh Amendment, require

See also *Ryan Distributing Corp. v. Caley,* 51 Fed. Supp. 377.

The result of the ruling in the *Beacon* case is that the basic right to jury trial of common substantial issues is lost when equitable rights are also in the case. The ruling in the *Beacon* case holds that it is the exercise of the court's discretion under Rule 42b which controls the right of jury trial. Moreover, in the exercise of this discretion, the constitutional right to jury trial as to legal issues, is neither a controlling, nor even a relevant factor. This is in direct conflict with the decision in *Leimer v. Woods, supra,* with *General Motors Corp. v. Calif. Research Corp., supra,* and is certainly in conflict in principle with the high place given to the right of jury trial by this court.

The construction of the Rules of Civil Procedure in the *Beacon* case conflicts with the enabling act, pursuant to which this Court promulgated, and the Congress adopted, the Rules of Civil Procedure. The Act of June 19, 1934, 48 Stat. 1064, 28 U. S. C. Sec. 723c, in granting the power to this court to prescribe rules of procedure, stated in part,—"Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant." If the rules are constructed to give to the courts the discretion to deny jury trial where, before the Rules, there was a right to such a trial, the substantive rights of litigants are clearly abridged. (Appendix A, p. 2.)

Similarly, in this manner, there is abridgment of the express provisions in the above designated statute,—"that

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the jury trial to be tried and determined first. This earlier opinion, cited with approval by many other circuit courts, is now disapproved by the *Beacon* decision. Professor Moore's views are in accord with the *General Motors* case, and the *Bruckman* case. (5 Moore Federal Practice (2d Ed.) pp. 148-158.)

in such union of rules, the right of trial by jury as at common law, and declared by the Seventh Amendment, that the Constitution shall be preserved to the parties inviolate." (Appendix A, p. 3.)

It should be noted that the Federal Rules, in many instances require all claims for relief, whether formerly denominated legal or equitable, or whether available as a claim or counterclaim, or cross-claim to be filed in the same action. The requirement is enforced by loss of the claim, if it is not tendered in the same action. In other instances, where *res judicata* principles are not applicable, the policy of the rule is expressly to encourage all claims by the diverse parties to be litigated in a single action.[15] But, the result of the *Beacon* decision is that if a litigant voluntarily or by compulsion files legal claims where the action also involves equitable claims, his right to jury trial is automatically lost. The litigant is thereafter subject to orders under Rule 42b, which are limited only by the court's discretion. Such a construction of the Federal Rules of Civil Procedure conflicts with the Enabling Statute cited *supra* and should be corrected by this Court.

It needs no demonstration to prove that important public policies are carried out through legislation which often provides for both legal and equitable remedies. As a re-

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[15]Rule 8a permits relief in the alternative or of several different types to be demanded. Rule 12b requires *every defense* to be asserted in the responsive pleading. Rule 13a requires the pleading of any counterclaim which a party has arising out of the transaction or occurrence that is the subject matter of the opposing party's claim. Rule 13b permits counterclaims against the opposing party without reference to the transaction or occurrence embodied in the claim. Rule 13g permits cross-claims against co-parties and rule 13h permits additional parties to be brought in. Rule 42a permits consolidation of actions although separately filed where such actions involved a common question of law or fact. (Appendix A, pp. 3-6.)

sult of the *Beacon* decision, the right to jury trial in such matters is uncertain, and the enforcement of those public policies are therefore uncertain.

As an example, the courts have long acknowledged that a litigant who seeks damages and an injunction in an antitrust case, does not waive the right to trial by jury. In *Ring v. Spina* (C. C. A. 2, 1948), 166 F. 2d 546, it was argued that the joinder of legal and equitable claims in the same action resulted in a waiver of the right to jury trial as a matter of law by analogy with the old equity rules wherein a joinder of legal and equitable claim resulted in such a waiver. The court rejected that contention. It held that this Court's opinion in *Fleitman v. Welsbach Street Lighting Co. of America,* 240 U. S. 27, 36 S. Ct. 233, 60 L. Ed. 505, established that a claim for damages under the antitrust laws is triable as of right by jury. The decision in the *Beacon* case now holds that this right to jury trial is lost; that if the court determines to try the antitrust issues under the equitable claim for an injunction first that Rule 42b provides the source of such power even though the effect is to destroy the right of jury trial which this Court in *Fleitman v. Welsbach Street Lighting Co. of America, supra,* acknowledged.

Legal and equitable remedies are made available jointly in many fields of public interest in addition to the field of antitrust enforcement. The ruling in the *Beacon* case makes the availability of such remedies, when they are sought in the same case, discretionary with the court through the simple device of pre-emption of trial under Rule 42b.[16]

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[16]See Note, "Denial of Jury Trial By the Joinder of Legal and Equitable Claims," 39 Iowa L. Rev. 350.

It is submitted that Rule 42b cannot be construed in this manner nor can it be applied in this case to destroy the right of jury trial. In the instant case, as has been argued above, the basic issues raised by the complaint were related to the requested adjudication that Fox West Coast was not violating the antitrust laws. The prayer for this adjudication was based upon contentions that the theatres were not in substantial competition. Since such basic issues are raised in the counterclaim, which is triable by a jury, that right to trial by jury should be sustained whether or not, prior to the Federal Rules, the claim by Fox West Coast would have been heard by a Chancellor. To make the test of jury trial turn on questions of substance and not of form would, in this case, strengthen the policy in favor of jury trials represented by the Seventh Amendment.

Wherefore, Petitioner prays that the Order of the Court of Appeals Denying the Petition for Writ of Mandamus be reversed and the case remanded to the Court of Appeals with directions (a) to issue the Writ of Mandamus as prayed for in the Petition to the Court of Appeals, or in the alternative (b) for further proceedings upon the Petition for Writ of Mandamus in accordance with this Court's order and opinion.

Respectfully submitted,

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